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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAIME AYALA DELGADO, Defendant and Appellant.	E055715 (Super.Ct.No. SWF029049) OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jaime Ayala Delgado appeals from the sentence the trial court imposed after remand by this court. We ordered a limited remand because at sentencing the trial court mistakenly believed it had no discretion to impose concurrent terms. Defendant contends the trial court was required to have conducted a full sentencing hearing on remand, at which it was required to consider imposing probation. As discussed below, the remand was limited to the trial court exercising its discretion as to whether to impose concurrent or consecutive terms. Therefore, the sentence imposed on remand is affirmed.

PROCEDURE

A jury convicted defendant of two counts of committing a lewd act with a child under age 14. (Pen. Code, § 288, subd.(a).)[1] Because the crimes were committed against more than one victim, the trial court sentenced defendant to 15 years to life for one count under section 667.61 and to six years on the other count. The trial court imposed the six-year term to run consecutive to the 15-years-to-life term. Defendant appealed.

On June 28, 2011, in an unpublished opinion in case number E049815, this court affirmed the judgment but reversed the imposed sentence after finding the trial court mistakenly believed it had no discretion to impose the two terms concurrently. In the introductory paragraph of the opinion, we "order[ed] a limited remand so the trial court can exercise its discretion on whether to impose the terms concurrently or consecutively." In the concluding, disposition paragraph of the opinion we reversed the imposed sentence and "direct[ed the trial court] to conduct a new sentencing hearing where it may exercise

[1] All section references are to the Penal Code.

its discretion in selecting between a consecutive or concurrent sentence on the multiple-victim enhancement. In all other respects, the judgment is affirmed."

On February 21, 2012, the trial court conducted the resentencing hearing and ordered the terms to run concurrently. The court refused defendant's request to consider a second time whether defendant was eligible for probation. The court reasoned that the wording of the opinion in case number E049815 limited the court to exercising its discretion as to whether to impose the sentences concurrently or consecutively. Defendant appealed.

DISCUSSION

Defendant contends that where, as here, an appellate court orders the trial court to conduct a new sentencing hearing, the defendant is entitled to be considered for probation. This is because, he argues, when a sentence is reversed and the matter is remanded for re-sentencing, "it is the same as if no sentence had been previously imposed."

However, the cases defendant cites in his brief are easily distinguished from the current matter. In some, the appellate court completely vacated the original sentence and ordered a general remand (*Van Velzer v. Superior Court* (1984) 152 Cal.App.3d 742; *People v. Tatlis* (1991) 230 Cal.App.3d 1266). In others, reconsideration of the entire sentencing scheme is warranted by the particular facts of the case (*People v. Burns* (1984) 158 Cal.App.3d 1178 [appellate correction of § 654 sentence significantly reduced the original sentence without any necessary warrant to do so in the facts of the case, justice required remand for the trial court to impose a sentence commensurate with

culpability]; *People v. Rojas* (1962) 57 Cal.2d 676 [requiring preparation of a new probation report where appellate court modified conviction of substantive offense to one of attempt]). Another case cited by defendant, *People v. Foley* (1985) 170 Cal.App.3d 1039, has been questioned and disagreed with by several courts.

On the other hand, defendant unsuccessfully attempts to distinguish *People v. Rodriguez* (1998) 17 Cal.4th 253 [superseded by statute on another point]. *People v. Rodriguez* clearly states that "a reviewing court has the power, when a trial court has made a mistake in sentencing, to remand with directions that do not inevitably require all of the procedural steps involved in arraignment for judgment and sentencing . . . . [I]t appears we may properly remand to permit the trial court to make the threshold determination of whether to exercise its discretion in defendant's favor without necessarily requiring resentencing unless the court does act favorably." (*Id*. at p. 258.)

More to the point, defendant argues that the terms of the remand in the current matter did not contain language limiting the trial court to consider only whether to exercise its discretion to impose concurrent terms. We disagree. This court clearly "order[ed] a limited remand so the trial court can exercise its discretion on whether to impose the terms concurrently or consecutively." Although this limitation was not so expertly set forth in the disposition portion of the opinion, we conclude that this court's direction to the trial court in its opinion was comprehensible as being limited to considering concurrent versus consecutive terms. Any other action by the trial court, such as re-considering whether defendant was eligible for probation, would have been

outside the scope of the remand. For this reason, the trial court did not err when it declined to consider whether defendant was eligible for probation.

DISPOSITION

The judgment of the trial court is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.